No. 06-1068

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON and BARRY S. WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION

JEROME B. FALK, JR.
Counsel of Record
STEVEN L. MAYER
KEITH D. KESSLER
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Center
7th Floor
San Francisco, CA 94111
(415) 434-1600

DENNIS A. SCHOVILLE
LOUIS G. ARNELL
JAMES S. IAGMIN
SCHOVILLE & ARNELL, LLP
1230 Columbia Street
Suite 800
San Diego, CA 92101
(619) 232-9901

Attorneys for Respondents

207836

CP

CAPITOL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Ford prefaces its statement of the Questions Presented with an incomplete précis of the facts. Although the jury verdict was for more than $368 million, the trial court reduced the award to $75 million in compensatory damages and $75 million in punitive damages. Petitioner's Appendix (Pet. App.) 15a. The California Court of Appeal then reduced the total compensatory damages for both plaintiffs to $27.606 million and the punitive damages to $55 million. *Id.* at 61a.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
TABLE OF APPENDICES	ix
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. FORD DID NOT PROPERLY RAISE ANY OF ITS THREE QUESTIONS PRESENTED AT EVERY STAGE OF THE STATE COURT PROCEEDINGS.	4
II. FORD'S VAGUENESS CLAIM PRESENTS NO ISSUE MERITING CERTIORARI.	10
III. THE OPINION'S ANALYSIS OF REPREHENSIBILITY PRESENTS NO ISSUE MERITING CERTIORARI.	14
IV. NOTHING IN *PHILIP MORRIS* SUPPORTS FORD'S PETITION.	19
A. Ford Did Not Preserve Any Issue Affected By *Philip Morris*, Precluding A Grant And Remand.	19
1. Ford Did Not Preserve The Substantive Issue Addressed In *Philip Morris*.	19

Contents

Page

2. Ford Did Not Preserve An Instructional Error Claim. 20

B. The Court of Appeal Did Not Punish Ford For Injuring Occupants Of Other Ford Vehicles. 21

1. The Principles Set Forth In *Philip Morris*. 21

2. The Opinion Accords With *Philip Morris*. 22

3. The Opinion Does Not Allow Improper Uses Of Evidence Or Jury Arguments Of Any Sort Rejected In *Philip Morris*. 24

a. Plaintiffs Did Not Offer Improper Evidence Of Bronco II Injuries. 24

b. Plaintiffs Made No Improper Arguments About Bronco II Injuries. 25

c The Opinion Does Not Endorse Improper Arguments About Non-Party Explorer Injuries. 26

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

Cases

Am. Drug Stores, Inc. v. Stroh, 10 Cal. App. 4th 1446 (1992) 6

Baker v. ExxonMobil Corp. (In re: Exxon Valdez), 472 F.3d 600 (9th Cir. 2006) 18

Barclays Bank, PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) 13

Beck v. Washington, 369 U.S. 541 (1962) 5

Clark v. Chrysler Corp., 436 F.3d 594 (6th Cir. 2006) 16, 17, 18

Clay v. Ford Motor Co., 215 F.3d 663 (6th Cir. 2000) 18

Coll. Hosp., Inc. v. Superior Ct., 8 Cal. 4th 704 (1994) 14

Denny v. Ford Motor Co., 662 N.E.2d 730 (N.Y. 1995) 18

Dunn v. HOVIC, 1 F.3d 1371 (3d Cir. 1993) 13

Evans v. Centerstone Dev. Co., 134 Cal. App. 4th 151 (2005) 5

Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists, 227 Cal. App. 2d 675 (1964) 21

Cited Authorities

Page

Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind. Ct. App. 1999) ..... *passim*

Gotcher v. Metcalf, 6 Cal. App. 3d 96 (1970) 29

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757 (1981) 12

Hasson v. Ford Motor Co., 32 Cal. 3d 388 (1982) ... 12

Hockensmith v. Ford Motor Co., 116 Fed. Appx. 244 (11th Cir. 2004) 19

In re Marriage of Goddard, 33 Cal. 4th 49 (2004) ... 9

In re S.C., 138 Cal. App. 4th 396 (2006) 5

Jaramillo v. Ford Motor Co., 116 Fed. Appx. 76 (9th Cir. 2004) 19

Karlsson v. Ford Motor Co., 140 Cal. App. 4th 1202 (2006) 25

Neumann v. Bishop, 59 Cal. App. 3d 451 (1976) ... 29

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 13, 14

People v. Gray, 37 Cal. 4th 168 (2005), *cert. denied*, 127 S. Ct. 38 (2006) 8

People v. Stitely, 35 Cal. 4th 514, *cert. denied*, 126 S. Ct. 164 (2005) 25

Cited Authorities

Page

People v. Wader, 5 Cal. 4th 610 (1993) 29

Philip Morris USA v. Williams, __ U.S. __, 127 S. Ct. 1057 (2007) ..... *passim*

Prince v. United Nat'l Ins. Co., 142 Cal. App. 4th 233 (2006) 6

Roberts v. Lomanto, 112 Cal. App. 4th 1553 (2003) 5

Romo v. Ford Motor Co., 113 Cal. App. 4th 738 (2003) 12

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 2, 16

Sweatman v. Dep't of Veterans Affairs, 25 Cal. 4th 62 (2001) 9-10

Tilbury Constructors, Inc. v. State Comp. Ins. Fund, 137 Cal. App. 4th 466 (2006) 7

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993) 13

Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612 (1992) 5

Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489 (1982) 12

Cited Authorities

Page

Watkins v. Ford Motor Co., 190 F.3d 1213 (11th Cir. 1999) 15, 23

White v. Ford Motor Co., 312 F.3d 998 (9th Cir. 2002) 13

Witte v. United States, 515 U.S. 389 (1995) 22, 24

Statutes

28 U.S.C. §1257(a) 19

49 U.S.C. §30103(e) 16

CAL. CIV. CODE
§3294 ..... 7, 10
§3294(a) 14
§3294(c)(1) 14

CAL. CODE CIV. PROC. §607a 29

CAL. R. CT.
8.204(a)(1)(B) 5, 7, 8, 9
8.500(c) 10
8.504(a) 5
8.504(b)(1) 5, 7
8.520(b)(2) 5
8.520(b)(3) 5

FORMER CAL. R. CT.
28(c) 10
28(c)(1) 10
28(c)(2) 10

Cited Authorities

Page

Other Authorities

H.R. Rep. No. 89-1776 (1966) 16

TABLE OF APPENDICES

Page

A — Excerpts of Appellants' Opening Brief in the Court of Appeal of the State of California, filed July 8, 2005 ..... 1a

B — Excerpts of Appellant's Petition for Review in the Supreme Court of California, filed August 28, 2006 ..... 7a

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari (the Petition) seeking review of a decision of the California Court of Appeal.

STATEMENT OF THE CASE

Ford's Petition and its Supplemental Brief offer a one-sided account of the facts and evidence. The Court of Appeal's opinion (the Opinion) fairly summarizes the events that led to this litigation, the Wilsons' catastrophic injuries and the evidence at trial. Pet. App. 5a-14a.

The jury awarded Mrs. Wilson $109.6 million, and Mr. Wilson $13 million, in compensatory damages. Pet. App. 14a. It also awarded $246 million in punitive damages. *Id.* at 15a. The trial court reduced the compensatory damages to $70 million for Mrs. Wilson and $5 million for Mr. Wilson, and the punitive damages to $75 million. *Id.*

The Court of Appeal affirmed the finding of liability. Noting that Ford had not challenged the sufficiency of the evidence (*id.* at 9a), the court described the history of the Explorer's design. Ford based the Explorer on a prior SUV (the Bronco II) with a history of great instability and susceptibility to rollovers. *Id.* at 9a-10a. Although it knew of these problems, Ford retained critical Bronco II design elements bearing on stability (a narrow track width and high engine mount and center of gravity) and carried over a high percentage of parts from the Bronco II, while rebranding it as the Explorer. *Id.* at 10a. Because making the necessary design changes would have delayed the Explorer's release date, Ford management rejected repeated requests by its engineers to increase the vehicle's track width and lower its center of gravity, thus preserving a lethal feature of the Bronco II. *Id.* at 9a-10a. For cosmetic reasons, management also increased the Explorer's tire size, exacerbating the vehicle's instability. *Id.* at 11a. In subsequent years, as it modified the Explorer's design, Ford management again declined for economic reasons to improve its stability. *Id.* at 12a-13a.

The Explorer was not just unstable; it also had a weak roof structure prone to crush in a rollover. *Id.* at 8a, 13a. Rollovers in vehicles with sturdy roofs are relatively nonviolent events for passengers who are properly restrained (as was Mrs. Wilson). *Id.* at 13a. Ford could have significantly strengthened the roof for about $20 per vehicle. *Id.*

The Court of Appeal upheld Mr. Wilson's $5 million compensatory damage award and Mrs. Wilson's $4.6 million economic damage award, but reduced her noneconomic damages to $18 million. *Id.* at 36a-37a, 60a-61a. The Petition does not challenge the resultant $27.6 million award of compensatory damages.

With respect to punitive damages, the Court of Appeal found that Ford had known that the vehicle was dangerously unstable and prone to rollover in normal driving conditions; had known that the roof structure was weak and prone to collapse in a rollover; and had known of technologically and economically feasible ways to stabilize the vehicle and strengthen its roof but chose for financial reasons not to use them. *Id.* at 43a-44a. The court also found that Ford had "evinced a reckless disregard for the safety of its customers" and had engaged in "a pattern of deficient design regarding safety in favor of increased financial returns and was [*sic*] the result of the conscious disregard of Ford executives." *Id.* at 56a. It thus concluded that "the reprehensibility of Ford's conduct was high." *Id.* at 55a; *accord*, *id.* at 58a, 59a.

Nevertheless, the court reduced the punitive damages to $55 million, a ratio of essentially 2:1. *Id.* at 60a. It noted this Court's comment in *State Farm* that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Id.* at 58a (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). In this case, however, it concluded "that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high." Pet. App. 58a-59a. It added that "[a]n award exceeding a two-

to-one ratio would exceed the constitutional maximum . . . under the facts of this case." *Id.* at 60a.[1]

1. Ford's incomplete statement of the case demonstrates its failure to absorb any lesson from the Court of Appeal's admonition that it had "neglect[ed] to discuss the evidence in support of the Wilsons' damages at all, much less in the light most favorable to the judgment." Pet. App. 27a n.6. For example, Ford seriously misrepresents the testimony of the Wilsons' stability expert: "Respondents' expert agreed that design characteristics, other than those reflected in the stability index, affect stability. As he testified, '[y]ou can't tell until you go out and test it.'" Pet. 4 (citations omitted). Ford neglects to say that the expert *did* test the Explorer, and that it fared very poorly. Far from relying solely on paper calculations of the Explorer's stability index—as the Petition suggests (*see id.* at 3)—Plaintiffs relied on their expert's extensive stability testing of production-model Explorers, as well as the real-world tests that Ford itself had conducted, until the vehicle's tendency to roll over at 40-55 m.p.h. led Ford to abandon such tests in favor of computer simulations. *See* Pet. App. 11a; 8 RT 1281-83, 1293-1301, 1318-27; 28 RT 5059:10-13; 1 RA 164-66, 1447-49; 9 AA 2503-17.

Ford compounds these omissions by misdescribing the testing it does acknowledge. It stresses its claim that the Explorer "passed" the Consumers Union (CU) test. Pet. 5. But the CU test is not a stability test that vehicles "pass" or "fail." As conducted by NHTSA and CU, it measured the Explorer's *handling*. Pet. App. 11a; 23 RT 4115. The test entails turning at increasing speeds through a series of cones; it ends when the vehicle reaches a speed at which it starts to slide and hit cones. 20 RT 3513-16. It thus yields not a "pass" or "fail" but a maximal speed at which a vehicle can navigate the course. 20 RT 3514-15, 3645-46. If that speed is less than the speed at which the vehicle rolls over, the test will not show that rollover speed. CU and NHTSA testing thus did not show that the Explorer rolls over on flat dry roads at sub-highway speeds. But *Ford's own testing did reveal that fact*. Ford used the CU course differently, in order to test the Explorer for *rollover*. It did not stop the test when the Explorer hit a cone, but kept going in order to determine the speed at which it rolls over in accident-avoidance maneuvers like that which resulted in Mrs. Wilson's accident; that speed was 40-55 m.p.h. *See* 8 RT 1298-1303, 1318-27; 1 RA 164-66; 5 RA 1236-48, 1296-1300; 6 RA 1437, 1447-49; 9 AA 2503-17. When Plaintiffs' experts tested production-model Explorers, the results were similarly dismal.

(Cont'd)

REASONS FOR DENYING THE PETITION

Ford has not challenged the judgment insofar as it finds liability for marketing a defective and dangerous product and awards compensatory damages. The Petition seeks review only of the award of punitive damages.

The Petition should be denied. Ford did not properly preserve any of its Questions Presented in state court. *See* Part I, *infra.* And on none of the issues presented does the opinion below conflict with a decision of this Court, a federal Court of Appeals or the highest court of a state. *See* Parts II-III, *infra.* Finally, there is no reason to remand the case for reconsideration in light of the decision in *Philip Morris USA v. Williams*, — U.S. —, 127 S. Ct. 1057 (2007), as Ford urges in its Supplemental Brief, for the Court of Appeal's opinion is fully consistent with *Philip Morris. See* Part IV, *infra.*

I. FORD DID NOT PROPERLY RAISE ANY OF ITS THREE QUESTIONS PRESENTED AT EVERY STAGE OF THE STATE COURT PROCEEDINGS.

Question 1 is whether California's punitive damages statute, as applied in this case, is unconstitutionally vague and fails to

---

(Cont'd)

See 9 RT 1416-32; 20 RT 3537-43, 3546; 5 RA 1306-07; 6 RA 1615 (video).

Ford also suggests that Plaintiffs relied on evidence in ways they did not. It asserts that "Respondents' expert . . . relied on a Ford document suggesting the Bronco II had a 'rollover rate three times higher than the Chevy S-10 Blazer'" (Pet. 3 (quoting Pet. App. 10a)) and that "[w]hile admitting evidence concerning comparative rollover rates of other vehicles, the trial court refused to allow Ford to present such data *as to the Explorer itself.*" Pet. 3 But as the Opinion shows, Plaintiffs' expert briefly referred to the Ford document only to show Ford's awareness of the instability problem in the vehicle on which it based the Explorer -- and its propensity to conceal rather than fix such defects. Pet. App. 10a. The court never mentioned "evidence concerning comparative rollover rates of other vehicles" in describing Plaintiffs' case for the simple reason that they did not use such evidence to prove the Explorer's defectiveness.

provide "fair notice." Pet. i, 10-11. While Ford raised that issue in the Court of Appeal, it did not present it properly to the California Supreme Court in its Petition for Review.

Ford implies that it did so in footnote 5 of that Petition. Pet. 9. It did not. California appellate rules require that all briefs "[s]tate each point under a separate heading or subheading summarizing the point." CAL. R. CT. 8.204(a)(1)(B); *id.* 8.504(a) (subjecting petitions for review to Rule 8.204); *In re S.C.*, 138 Cal. App. 4th 396, 408 (2006). Consequently, an issue raised only in a footnote is not properly presented and is deemed waived. *See, e.g., Evans v. Centerstone Dev. Co.*, 134 Cal. App. 4th 151, 160 (2005) ("[P]laintiffs raise this issue in a two-page footnote in the introduction to the opening brief. This is a violation of court rules that require arguments to be contained in discrete sections with headings summarizing the point. We do not have to consider issues discussed only in a footnote" (citation omitted)); *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1562 (2003) (same); *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 624 n.2 (1992) ("We do not view as adequate to preserve an issue on appeal . . . one footnote[d] mention of [it]"). Moreover, a Petition for Review "must begin with a concise, nonargumentative statement of the issues presented for review" (CAL. R. CT. 8.504(b)(1)); the California Supreme Court ordinarily does not consider issues not expressly raised or fairly included therein. *Id.* 8.520(b)(2), (3).

Ford met none of these requirements. Its Petition for Review identified three "Issues Presented" on which review was sought (Respondents' Appendix filed herewith (Resp. App.) 10a); *vagueness/"fair notice" was not among them.* Nor do the Petition's topic headings ever mention the issue. *See id.* at 8a-9a. Indeed, the body of the Petition includes not a word about a void for vagueness or "fair notice" issue.

The issue appears only in a footnote, which is insufficient under California law. Question 1 is thus procedurally barred. *See Beck v. Washington*, 369 U.S. 541, 553 (1962) (federal claim not raised in "assignments of error" in state supreme court brief,

as required by state procedural rule, was waived, even though one sentence of brief mentioned claim).

Question 2 is whether the Court of Appeal "rendered the 'reprehensibility guidepost' a nullity." Pet. i. Ford mainly argues that the court misanalyzed "reprehensibility" when it "gave no weight to the many objective factors, such as industry custom, federal regulatory judgment, and reasonable grounds for disagreement, that significantly mitigate against any finding of reprehensibility." Pet. 24.[2]

Ford did contend in the Court of Appeal that it had met federal regulatory standards, and that experts reasonably disagree about the design issues. *See* Appellants' Opening Brief (AOB) 42-56. However, Ford presented this issue only as one of state law. *Id.* at 56 ("[A]t most . . . Ford's managers and engineers were aware of reasonably debatable safety issues and made reasonably defensible judgments about them. That cannot, *under California law*, be boot-strapped into a finding of malice") (emphasis added). Ford's opening brief never claimed that the *federal Constitution* required that weight be given to either of these factors in assessing the reprehensibility of its conduct. *See id.* at 78-79.[3] Accordingly, the claim is also procedurally barred.

---

2. Ford also contends that the Court of Appeal misapplied the "reprehensibility" factor when it found that Plaintiffs were "vulnerable" (Pet. 25) and that "'Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management.'" Pet. 26 (quoting Pet. App. 57a). Ford's Petition for Review did not present either point. *See* Resp. App. 11a-15a (argument that punitive damages were excessive).

3. One paragraph in Ford's reply brief argued that federal law required the Court of Appeal, in assessing reprehensibility, to consider Ford's alleged compliance with regulations and so-called "industry custom." Appellants' Reply Br. 48. But California law precludes the raising of new issues in reply briefs. *See, e.g., Prince v. United Nat'l Ins. Co.*, 142 Cal. App. 4th 233, 238 (2006) (citing *Am. Drug Stores, Inc. v. Stroh*, 10 Cal. App. 4th 1446, 1453 (1992)). Nor did Ford frame its regulatory compliance and "industry custom" arguments in terms of federal law in its Petition for Rehearing to the Court of Appeal. *See* Pet. Reh'g 43-50.

The same is true of Ford's claim about "industry custom" (*i.e.*, comparative statistical evidence regarding the Explorer's rollover rate). Ford's opening brief in the Court of Appeal never contended that the federal Constitution required consideration of such evidence in determining the reprehensibility of conduct in order to assess the amount of punitive damages. *See* Resp. App. 5a-6a. Moreover, under California rules of appellate practice, Ford's Petition for Review adequately raised the exclusion of its comparative statistical evidence *only as an issue of state evidence law. See* Pet. Rev. 14-21. The section of the Petition discussing federal constitutional issues (*id.* at 32-37) never mentions the exclusion.[4] That claim, too, is procedurally barred.

4. The Petition asserts in passing that comparative statistical evidence "was also relevant to the due process issue of the degree of reprehensibility of Ford's conduct, and was required to be admitted as a matter of state and federal due process." Pet. Rev. 22-23. However, this sentence was placed in a section arguing that the evidence was admissible as a matter of state evidentiary law to determine whether Ford's conduct was "despicable" under Civil Code Section 3294, California's punitive damages statute. *See* Pet. Rev. 21-25 (Part I(B)); *see also id.* at 13 (Part I) (framing evidence argument as raising a state law issue). But even if it had been placed in the portion of Ford's Petition for Review expressly addressing federal constitutional issues, the single sentence in the Petition contending that due process required the admission of comparative statistical evidence would have been insufficient under California's rules of appellate procedure to present this issue to the California Supreme Court. *See, e.g., Tilbury Constructors, Inc. v. State Comp. Ins. Fund*, 137 Cal. App. 4th 466, 482 (2006) (applying Rule 8.204(a)(1)(B) (as then numbered) to reject party's attempt to raise issues "[i]n a single sentence in its opening brief contained within its arguments about [another issue]").

Nor did the Petition for Review's statement of "issues presented" include the "due process/comparative statistics" issue. *See* Resp. App. 10a. A single sentence in the Petition's body does not comply with the California Supreme Court's requirement, discussed at p. 5, *supra*, that every Petition "must begin with a concise, nonargumentative statement of the issues presented for review" (CAL. R. CT. 8.504(b)(1)) and that only those issues will normally be considered by that court.

Finally, even if Ford had adequately presented this issue to the California Supreme Court, the Court of Appeal also affirmed the exclusion of Ford's comparative rollover evidence as unreliable and misleading under California law. *See* Pet. App. 23a-24a. Hence, the exclusion of this evidence rests on an adequate and independent nonfederal ground having nothing to do with Ford's belated federal claims.

Question 3 is whether the Due Process Clause prohibits "punish[ing] a manufacturer for selling products not at issue in the case" or "for selling products . . . to third parties not before the court." Pet. i. Ford did not preserve that issue either.

As explained below (*see* pp. 20-21, *infra*), Ford did propose a jury instruction touching on this issue. But it did not contend before the Court of Appeal or California Supreme Court that the refusal to so instruct the jury was error, let alone of constitutional dimension. (And it was not error: as explained on pp. 20-21, *infra*, the instruction misstated the law.)

While Ford did complain to the Court of Appeal that Plaintiffs had asked the jury to punish it for Bronco II injuries suffered by non-parties (*see* AOB 14-15; Appellants' Reply Br. 4-5), Ford had and has forfeited that claim in no less than three ways (two at trial and one on appeal). At trial, Ford never objected to the parts of Plaintiffs' closing that it now claims improperly sought punishment for non-party injuries, thus failing to preserve the issue. *See, e.g.*, *People v. Gray*, 37 Cal. 4th 168, 215 (2005), *cert. denied*, 127 S. Ct. 38 (2006). Moreover, Ford itself proposed an instruction authorizing the jury to consider evidence of harm to non-parties. *See* pp. 28-29, *infra*. And on appeal, Ford raised Bronco II-related jury arguments only in the part of its brief challenging the use of Bronco II evidence *as a matter of state law* (AOB 14-15)—not in those addressing punitive damages. *Cf.* Resp. App. 2a-4a.; AOB 40-63, 74-79. In California appellate practice, a passing reference to the federal Constitution in the text of an argument about state evidence

law does *not* preserve a federal constitutional claim. *See* CAL. R. CT. 8.204(a)(1)(B) and authorities cited at p. 5, *supra*.

In the wake of *Philip Morris*, Ford suggests that Plaintiffs offered not just jury arguments but evidence of non-party injuries suffered in Bronco IIs or Explorers. Supplemental Brief for Petitioner (Supp. Br.) 4-8. Ford cites no such evidence in the record because, as discussed below (*see* pp. 24-26, 27 n.14, *infra*), there is none. But even if there were, Ford's Petition for Review did not challenge its admission. *Cf.* Resp. App. 8a-9a.

That Petition did briefly contend that the Court of Appeal had "found Ford's conduct 'more reprehensible' because it was 'repeated and not an isolated incident' based on the fact that Ford mass-marketed the Explorer [and] Bronco II." Resp. App. 14a (quoting Pet. App. 56a-57a).[5] But neither the paragraph from which Ford quotes the "repeated not isolated" passage (*see* Pet. App. 56a-57a) nor any other part of the Opinion mentions the mass-marketing of those SUVs as a reason Ford's conduct was reprehensible. Because the Opinion never *states* the proposition that Ford attributes to the court (*i.e.*, that mass-marketing turns the design and sale of a defective product into "repeated misconduct"), Ford's argument must be that the Court of Appeal relied on that idea *implicitly*, without examining its correctness.[6] But to preserve *that* argument for review, California law required Ford to call the Court of Appeal's alleged (and assertedly erroneous) assumption to that court's attention in a petition for rehearing. CAL. R. CT. 8.500(c); *In re Marriage of Goddard*, 33 Cal. 4th 49, 53 n.2 (2004); *Sweatman v. Dep't of Veterans Affairs*,

---

5. *Philip Morris* makes clear that a jury may, in evaluating the reprehensibility of a manufacturer's conduct, consider the disregard for public safety inherent in knowingly selling dangerous products. *See* pp. 21-22, *infra*.

6. In reality, the Court relied on no such idea: it found Ford's misconduct "repeated" because Ford repeatedly made choices sacrificing public safety for profits and production schedules, through the long history of the Bronco II and successive models of the Explorer. *See* p. 23, *infra*.

25 Cal. 4th 62, 68 n.1 (2001).[7] Ford did not do this: the treatment of mass-marketing as repeated misconduct, or indeed the imposition of punishment based in any way on third-party injuries, is one of the few issues that Ford's 68-page Petition for Rehearing did *not* raise. Accordingly, Ford failed to preserve any such issue.

Summary. Not one of the issues Ford now presents was properly raised at every stage of the proceedings below. Moreover, Question 2 is also barred, insofar as it concerns comparative statistical evidence, because the Court of Appeal's affirmance of the ruling excluding this evidence rests on an adequate and independent state law ground.

II. FORD'S VAGUENESS CLAIM PRESENTS NO ISSUE MERITING CERTIORARI.

Ford's vagueness argument is really a quarrel with California law that it has tried to repackage as a federal question. Ford first contends that the Court of Appeal "dismissed as *irrelevant* all objective standards," including "compliance with federal regulations and policy judgments, and the existence of an objectively reasonable disagreement in the engineering community," in awarding punitive damages. Pet. 13 (emphasis added). It then argues that this decision has rendered the state's punitive damages statute (CAL. CIV. CODE §3294) void for vagueness, at least as applied to it. Pet. 9-22. Even if Ford had properly presented this issue to the California Supreme Court, it would not merit certiorari.

---

7. California Rule of Court 28(c) (now Rule 8.500(c)) provided that "[a]s a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal" (*id.* 28(c)(1)) and that the Supreme Court "normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." *Id.* 28(c)(2). Here, the "opinion's statement of the issues" never mentions mass-marketing as a basis for finding reprehensibility; the California Supreme Court was entitled to accept that framing of the issue.

In the first place, the argument's premise is demonstrably false. Ford contended below that, *as a matter of California law*, those circumstances preclude punitive damages. The Court of Appeal did hold that compliance with federal regulations and the existence of disputes in the engineering community are not absolute defenses to an award of punitive damages. Pet. App. 43a-51a. However, it did not hold that evidence of compliance with federal standards or of engineering disputes was irrelevant or inadmissible. Indeed, Ford was free to present evidence in the trial court concerning its claimed regulatory compliance and the views of its experts as to the design and safety issues pertinent to this case, and it did so. *See, e.g.*, 2 AA 528-35; 10 AA 2618-56; 10 RT 1723-36; 28 RT 5145, 5179 (regulatory compliance); 28 RT 5152-54, 5164-67; 3 AA 716-19, 756 (expert disagreement); *cf., e.g.*, 3 AA 605-717 (NHTSA's decision not to regulate stability). Similarly, the trial court did not preclude Ford's counsel from arguing to the jury that it should not award punitive damages, or should lessen their amount, because Ford (allegedly) complied with regulations and/or because some experts support its design decisions. Ford's vagueness argument thus rests on misstatements of what the California trial court did and what the Court of Appeal held.

Moreover, Ford concedes that "the California punitive damage standard is theoretically capable of rational application in many circumstances" (Pet. 12) and that it "is making an as-applied challenge, and is not arguing that the statute is unconstitutional on its face." *Id.* at 13 n.2. This concession necessarily narrows the range of cases to which the principles Ford advocates might be applied, thereby diminishing the importance of review in this case.

Even as applied to products liability cases, Ford's vagueness argument is unworthy of review. That argument is premised on two propositions: (1) that "California's standards for determining strict liability for defective product designs are exceedingly vague and subjective" (Pet. 11-12); and (2) that an automobile manufacturer cannot "determine, in advance, if its design

decisions . . . would subject it to punishment in California, and [is left] with no guidance as it makes day-to-day design decisions about what might subject it to punitive damages." Pet. 14. The first of these propositions is not properly before the Court. Ford's Petition challenges only the award of punitive damages. Having chosen not to contest its liability for compensatory damages under California tort law, Ford has no standing to complain that California's standards for imposing such liability are unconstitutionally vague. *See Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982) (because "'[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand,' '[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness'") (citations omitted).

The same principle precludes Ford from arguing that California's punitive damages standards are unconstitutionally vague as applied to it. The evidence established that Ford knowingly produced and sold an automobile that (1) would roll over in normal driving conditions and on dry pavement if a driver swerved to avoid an obstacle, (2) had a roof so weak that it would collapse during a rollover and (3) could easily have been made more stable and given a stronger roof through well-known, available and cost-effective design changes. Pet. App. 43a. Yet Ford declined for profit-maximization reasons to make feasible and affordable design corrections urged by its own engineers. *Id.* at 10a, 12a-13a. Thus, however California punitive damages law may be applied in other cases, Ford unquestionably had notice that its conduct could result in punitive damages liability. Indeed, courts in California, among other states, had instructed Ford on that very subject before. *See Hasson v. Ford Motor Co.*, 32 Cal. 3d 388 (1982) (Continental); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (2003) (Bronco); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981) (Pinto); *see also, e.g., Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. Ct. App. 1999) (Bronco II).

In any event, Ford's suggestion that California's punitive damages standards are unconstitutionally vague is meritless. Ford cites a great many of this Court's vagueness opinions from 1915 to 1966 involving dissimilar statutes applied in dissimilar contexts. Pet. 15-18. But its reliance on these dissimilar cases ignores the principle that "rules against vagueness are not 'mechanically applied,' but depend in their application, on 'the nature of the enactment.'" *Barclays Bank, PLC v. Franchise Tax Bd.*, 512 U.S. 298, 316 (1994) (citation omitted). Consequently, the relevant vagueness cases—which Ford altogether ignores—are this Court's two much more recent decisions rejecting similar vagueness challenges to punitive damages laws far less specific than California's. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465-66 (1993) (plurality opinion) ("the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20, 24 n.12 (1991).[8] (Ford's statement (Supp. Br. 2) that "[t]his Court has never directly addressed the due process constraints on the imposition of punitive damages liability in the first instance" is obviously incorrect.) Indeed, Ford cites no case holding a punitive damages statute unconstitutional, and makes no mention of decisions rejecting similar vagueness challenges to punitive damages laws. *See, e.g., White v. Ford Motor Co.*, 312 F.3d 998, 1026 (9th Cir. 2002); *Dunn v. HOVIC*, 1 F.3d 1371, 1381-82 (3d Cir. 1993) (en banc).

In comparison to the punitive damages statutes upheld in *TXO* and *Haslip*, the California statute gives prospective defendants ample notice. It requires "clear and convincing

8. Justice O'Connor dissented in *Haslip*, arguing that Alabama's punitive damages law—which was implemented by an instruction telling the jury that "[i]mposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so" (*see* 499 U.S. at 6 n.1)—was void for vagueness. *Id.* at 42-53. No other member of the Court joined that dissent.

evidence that the defendant has been guilty of oppression, fraud, or malice." CAL. CIV. CODE §3294(a). It defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." *Id.* §3294(c)(1). Moreover, this jury was instructed (in accordance with California precedent) that "'[d]espicable conduct' is conduct that is so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people." 35 RT 8281.[9] The California Supreme Court has explained that the requirement to show "despicable" conduct "represent[s] a new substantive limitation on punitive damage awards." *Coll. Hosp., Inc. v. Superior Ct.*, 8 Cal. 4th 704, 725 (1994).

These standards go far beyond those previously upheld by this Court, and ensure that punitive damages are imposed only on defendants whose conduct merits punishment. Accordingly, they are not unconstitutionally vague, especially as applied to Ford's reprehensible conduct here.

III. THE OPINION'S ANALYSIS OF REPREHENSIBILITY PRESENTS NO ISSUE MERITING CERTIORARI.

Ford contends that the Court of Appeal violated the federal Constitution because, in assessing the reprehensibility of Ford's conduct, it "gave no weight to the many objective factors, such as industry custom, federal regulatory judgments, and reasonable grounds for disagreement, that significantly mitigate against any

9. Likewise, in the trial's second phase, which decided the amount of punitive damages, the court also gave standard California instructions far more detailed than the one upheld in *Haslip*. Among other things, it told the jury that "[i]n deciding the amount of punitive damages, if any, you should consider . . . A, how reprehensible was the defendant's conduct; B, is there a reasonable relationship between the amount of punitive damages and Benetta Wilson's and Barry Wilson's harm; C, in view of the defendant's financial condition, what amount is necessary to punish it and discourage future wrongful conduct." 41 RT 8527.

finding of reprehensibility." Pet. 24. As already noted, this contention was not properly presented below, and challenges a ruling that rests in part on an adequate and independent non-federal ground. *See* pp. 5-8, *supra.*

In any event, Ford's argument presents no issue meriting certiorari. Ford cites no case holding that either factor, if established, is an absolute bar to punitive damages. And to the extent its argument, toned down from its California submission, is merely that compliance with applicable regulations or reasonable disagreement among experts are factors to be taken into account in determining the degree of reprehensibility, and therefore the maximum constitutionally permissible ratio between punitive and compensatory damages, neither the Court of Appeal nor Plaintiffs disagree. As noted above, Ford was free to argue, in both the trial court and the Court of Appeal, that compliance with regulations and the existence of a reasonable disagreement between experts were reasons not to award punitive damages at all, or to reduce the amount of the award. *See* pp. 6, 11, *supra.* There is no reason to think these arguments fell on deaf ears: after all, the trial judge reduced the punitive damages award from $246 million to $75 million, and the Court of Appeal reduced it further, to $55 million.

The reason why Ford's arguments for mitigation didn't reduce the punitive damages further still was that those arguments suffered from a weak factual basis. As the Court of Appeal pointed out, "there are no federal standards for stability of vehicles, one ground upon which Ford's liability for punitive damages is based." Pet. App. 49a-50a; *see also Watkins v. Ford Motor Co.*, 190 F.3d 1213, 1218 (11th Cir. 1999). Nor are there any federal regulatory standards regarding roof-strength warnings, another ground for liability.[10] And, as the Court of

10. Although one non-preemptive federal regulation does govern roof structure, there was a serious factual dispute at trial, never resolved by a jury finding, as to whether Ford had complied with it. *See* 12 RT 2136-37, 2141-42 *and* 10 AA 2621 (evidence that Ford only passed

(Cont'd)

Appeal also emphasized, federal automobile safety regulations expressly do not preempt state law liability for defective vehicles (49 U.S.C. §30103(e)) and thus do not "'affect the rights of parties under common law particularly those related to warranty . . . and tort liability.'" Pet. App. at 48a-49a (emphasis omitted) (quoting H.R. Rep. No. 89-1776, at 24 (1966)).

As for the claimed disagreement among experts, the Court of Appeal found that Ford engineers had proposed design changes that would have improved the Explorer's stability, but that management rejected them because implementation "would have delayed the vehicle's release date and impacted profits." Pet. App. 9a-10a, 12a. Ford presented *no* evidence that its management had relied on any recommendations by Ford safety engineers *against* the rejected safety proposals. Nor did it present any evidence that its management had studied any debate among outside safety experts. Nothing in the record suggests that Ford's management made anything but a pure business decision—not one based on that management's good-faith, reasonable review of an engineering disagreement.

Even if these factors gave *some* support to Ford's argument for mitigation of the punitive damages award, there would be no reason for this Court to review whether the California courts weighed those factors correctly. In the end, the Court of Appeal reduced the punitive damages beyond the trial court's reduction, resulting in a ratio of 2:1. Nothing in its analysis contradicts the standards established in *State Farm* or either of the decisions claimed by Ford to be in conflict with the decision in this case.

The opinion here is consistent with (and in critical respects distinguishable from) *Clark v. Chrysler Corp.*, 436 F.3d 594, 602 (6th Cir. 2006). The panel majority in *Clark* did reduce a $3 million punitive damages award to roughly $470,000, based

(Cont'd)
FMVSS 216 roof crush test by improper means); 12 RT 1980, 2131-32 (evidence that many Explorers on the road have roofs too weak to pass test).

in part on the existence of a good-faith dispute over the need to test the strength of the failed part at issue. 436 F.3d at 602; *cf. id.* at 614 (Moore, J., dissenting in part) (finding award not excessive). But the *Clark* majority found that, in light of the scientific dispute and other evidence, the maximum constitutionally permissible ratio of punitive to compensatory damages was 2:1 (*id.* at 600); the dissenting judge found the original ratio of 13:1 *not* excessive. *Id.* at 614 (Moore, J., dissenting in part). *Clark* hardly supports an attack on an award bearing the very ratio it *upheld.*

Moreover, in *Clark* "there [was] no evidence that a boxed-in B-pillar [*i.e.*, plaintiff's alternative design] would have prevented the harm suffered by Mr. Clark." *Id.* at 602. Accordingly, Clark's experts "did not conduct any tests to see whether another B-pillar would have prevented [the accident] under similar circumstances." *Id.* In contrast, there was ample evidence in the present case that greater stability *or* a stronger roof *or* a warning about the roof's weakness would have prevented the injuries suffered by Mrs. Wilson. Pet. App. 8a-9a, 13a, 14a; 9 RT 1391-92; 19 RT 3420-23; 20 RT 3543; 12 RT 2159; 15 RT 2642-43, 2668-69; 25 RT 4495-96; 26 RT 4657. In particular, Plaintiffs' expert based his testimony that Plaintiffs' proposed alternative designs would have prevented the harm suffered by the Wilsons in significant part on extensive independent testing. *See* note 1, *supra* (citing expert testimony, and documentation and videos of testing, presented to jury). Moreover, the *Clark* majority expressly found that Chrysler was *not* a recidivist: "In this case, there is no evidence that Chrysler knew that its use of the unboxed B-pillar could cause Mr. Clark's injury. Indeed, there is no evidence of earlier, similar accidents that might have alerted Chrysler to the problem." 436 F.3d at 604–05 (footnote omitted). In this case there was ample evidence of Ford's recidivism: the contrast between Chrysler's lack of notice in *Clark*, and the trail of "earlier, similar accidents"

involving the Bronco II that had alerted Ford to the danger of instability,[11] could not be starker.

Ford also contends that the decision below conflicts with *Clark* and *Baker v. ExxonMobil Corp.* (*In re: Exxon Valdez*), 472 F.3d 600 (9th Cir. 2006), because the Court of Appeal said that automobile consumers "were vulnerable as they would not understand vehicle design, development and manufacture, and would rely on Ford to inform them of risks as they made purchasing decisions." Pet. App. 56a. There is no conflict. *Clark* held that *Chrysler's* wealth could not be considered in determining the vulnerability of the *plaintiff*. 436 F.3d at 604. The Court of Appeal made no such error in this case.[12] In *Exxon Valdez*, there was no "dispute that subsistence fisherman were financially vulnerable" (472 F.3d at 616-17); the Ninth Circuit merely held that Exxon had "not *intentionally* target[ed] subsistence fisherman." *Id.* (emphasis added). Neither *Clark* nor *Exxon Valdez* hinted, let alone held, that courts analyzing reprehensibility must ignore "vulnerability" of an injured party that is due to a lack of specialized knowledge on an esoteric scientific topic like automobile safety engineering, or an inability to obtain adequate information on that issue. Ford cites no case so holding. There is no conflict for this Court to resolve.

Finally, Ford claims that, because it assertedly won eleven Explorer cases before the trial of this case, the Court of Appeal

11. *See Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 545-49, 556-57, 562 (Ind. Ct. App. 1999); *Clay v. Ford Motor Co.*, 215 F.3d 663, 665 (6th Cir. 2000); *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 733 (N.Y. 1995); *see also* 9 AA 2527-53, 2565-82; 5 RA 1273 (evidence Ford knew that roof crush causes injury in rollovers).

12. Ford misrepresents the opinion below as having said that "'[t]he defendant's financial condition is an essential factor in fixing an amount'" of punitive damages (Pet. 25) without so much as an ellipsis to indicate that the sentence continued as follows: ". . . that is sufficient to serve these goals without exceeding the necessary level of punishment." Pet. App. 51a. Accordingly, the Court of Appeal did not endorse use of the defendant's wealth in evaluating the plaintiff's vulnerability—the trial court's error in *Clark*.

erred in finding its conduct "repeated and not an isolated incident." Pet. 27 (citing Pet. App. 56a-57a). The trial court refused to allow Ford to use prior verdicts in its favor (41 RT 8516, 8534-37), and Ford did not challenge this ruling on appeal or, for that matter, in its Petition for Review. (Significantly, two of the verdicts have since been *reversed*, with directions to exclude on retrial the comparative rollover statistics that the trial and appellate court excluded in the present case. *See Jaramillo v. Ford Motor Co.*, 116 Fed. Appx. 76, 78-79 (9th Cir. 2004); *Hockensmith v. Ford Motor Co.*, 116 Fed. Appx. 244 (11th Cir. 2004)). In any event, Ford's premise—that it was punished for "repeated" sales of Ford Explorers to other persons—is false. *See* Part IV, *infra*. That juries in other cases, presented with different witnesses and evidence by different lawyers, came to different conclusions than the jury in this case has no bearing on whether the conduct Plaintiffs proved in this case was reprehensible.

IV. NOTHING IN *PHILIP MORRIS* SUPPORTS FORD'S PETITION.

Ford asked the Court to hold the Petition until it announced a decision in *Philip Morris USA v. Williams*, __ U.S. __, 127 S. Ct. 1057 (2007). The Court announced that decision on February 20. Ford then filed its Supplemental Brief. However, nothing in *Philip Morris* supports any argument in the Petition or warrants a remand.

A. Ford Did Not Preserve Any Issue Affected By *Philip Morris*, Precluding A Grant And Remand.

1. Ford Did Not Preserve The Substantive Issue Addressed In *Philip Morris*.

In its Supplemental Brief, Ford urges the Court to grant certiorari in order to remand for reconsideration in light of *Philip Morris*. But the Court has power to grant, vacate and remand only if Ford's petition satisfies the jurisdictional requirements of 28 U.S.C. §1257(a).

As shown in Part I, at pp. 8-10, *supra*, it does not: Ford did not properly preserve the issue that would be the subject of a grant, vacate and remand order. Ford's complaint is that the Court of Appeal improperly punished it for mass-marketing Explorers and Bronco IIs to third parties. Because Ford did not adequately present this issue as one of federal law, or raise it in a petition for rehearing as California law required, the Court lacks jurisdiction of it.

2. Ford Did Not Preserve An Instructional Error Claim.

An issue raised (but not resolved) in *Philip Morris* was whether the trial court erred in refusing to instruct the jury that it could "consider the extent of harm suffered by others in determining . . . [the] reasonable relationship" between plaintiff's harm and punitive damages, but could not "punish the defendant for the impact of its alleged misconduct on other persons." *Philip Morris*, 127 S. Ct. at 1061. As the Court noted, the instruction Philip Morris had proposed "distinguishe[d] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment" (which it would not). *Id.* at 1064.

Ford proposed no such instruction. Its proposal, which the trial court rejected, was erroneous and one-sided:

> In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiffs. Any individuals other than the plaintiffs who might claim to have been harmed by Ford have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit. (Pet. App. 103a)

Unlike Philip Morris's instruction, Ford's would have barred the jury from considering Ford's overall conduct in

determining reprehensibility. Because that instruction did not completely state the governing legal principles, the trial court properly rejected it under California law. *E.g.*, *Fibreboard Paper Prods. Corp. v. E. Bay Union of Machinists*, 227 Cal. App. 2d 675, 716-17 (1964) (judge has no duty to rewrite incorrect instructions). The refusal thus rests on an adequate and independent state ground.

In any event, no instructional error issue has been preserved. Before the Court of Appeal and in its Petition for Review, Ford did not claim—even on state law grounds and certainly not on federal constitutional grounds—that the trial court incorrectly instructed the jury or erred by refusing to give the foregoing instruction. *See* Resp. App. 2a-4a, 8a-9a.

B. The Court of Appeal Did Not Punish Ford For Injuring Occupants Of Other Ford Vehicles.

Ford claims that the Court of Appeal punished it "for its sales of the Explorer—as well as the Bronco II—to third parties not before the court." Pet. 2-3. Even if that argument had been properly preserved, it would still rest on a misreading of the Opinion. In fact, the Court of Appeal evaluated the punitive damages award in prescient accord with the principles this Court later enunciated in *Philip Morris*.

1. The Principles Set Forth In *Philip Morris*.

Philip Morris draws a line between "show[ing] harm to others in order to demonstrate reprehensibility" and "punish[ing] a defendant directly on account of harms it is alleged to have visited on nonparties." 127 S. Ct. at 1064. While barring the latter, the Court affirmed the propriety of the former:

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . . (*Id.*)

The Court later reiterated its "recogni[tion] that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Id.* at 1065.

After noting the heightened reprehensibility of acts that threaten harm to many victims, the Court further invoked the principle, derived from criminal recidivism cases, that an act is more reprehensible if it is the latest in a string of similar misdeeds. *Id.* (describing *Witte v. United States*, 515 U.S. 389, 400 (1995), as holding that "recidivism statutes taking into account a criminal defendant's other misconduct do not impose an additional penalty for the earlier crimes, but . . . a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one") (citation and internal quotation marks omitted). In short, *Philip Morris* affirms that a manufacturer's long history of disregard for public safety can be considered in evaluating the "reprehensibility" of its conduct toward the plaintiff.

2. The Opinion Accords With *Philip Morris*.

Although we discuss below Ford's mistaken assertions that the trial transcript includes evidence or closing arguments inconsistent with the above principles (*see* Part IV(B)(3), *infra*), the crucial point is that the Opinion adheres to those principles. What most matters to the Court's exercise of its certiorari jurisdiction, after all, is not passages in a trial transcript but the text of the published appellate opinion allegedly creating confusion or conflict in the law.

That text in no way suggests that Ford was or should be punished for selling Explorers (or Bronco IIs) to multiple buyers. The passages of which Ford complains are all in a section of the Opinion headed "Reprehensibility of conduct." Pet. App. 55a. They form part of the Court's analysis of the "reprehensibility" of Ford's conduct—an analysis concluding that, because "the degree of Ford's reprehensibility is . . . high," a "two-to-one ratio is warranted." Pet. App. 59a. There is no dispute that this is how the Court of Appeal used Ford's past conduct: Ford's Petition for Review acknowledged that the court had analyzed its past conduct *as relevant to reprehensibility*. *See* p. 9, *supra* (quoting Resp. App. 14a).

As part of that reprehensibility analysis, the Opinion notes that "Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns . . . [as] evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer." Pet. App. 57a. This conclusion had nothing to do with punishing Ford for injuries suffered by other Explorer occupants. What made Ford's design and marketing of the Explorer that injured the Wilsons reprehensible were (1) Ford's similar disregard of public safety in designing the Bronco II; (2) its decision to carry over, into the Explorer, design features that made the Bronco II unstable and unsafe, despite its own engineers' recommendations to make the design safer; (3) its disregard of prior product liability judgments and punitive damage awards regarding the Bronco II when it designed and produced the successor vehicle that injured the Wilsons; and (4) its repeated failure to correct the original Explorer's stability and roof strength defects in successive models, even though it was feasible and cost-effective to do so, because Ford favored maximizing financial returns and meeting production schedules over ensuring the safety of Explorer occupants. *See* Pet. App. 9a-10a, 12a-13a, 43a-44a, 56a-57a.

The reprehensibility of Ford's failure to correct the Bronco II's safety defects when it produced the Explorer is underscored by a string of decisions finding the Bronco II to be dangerous and defective, and often imposing significant punitive damages. *See, e.g.*, *Watkins*, 190 F.3d at 1216-18; *Ammerman*, 705 N.E.2d at 556-57, 562. Yet Ford produced a new-generation vehicle, rebranding it "the Explorer," without correcting its predecessor's fundamental stability defects. To consider, as part of a reprehensibility analysis, a manufacturer's wrongful acts in designing a related series of defective products over an extended period differs entirely from punishing that manufacturer for the injuries caused to non-parties because it mass-produced a single product, or for the injuries caused to non-parties by the prior,

related products. *See Philip Morris*, 127 S. Ct. at 1065; *Witte*, 515 U.S. at 400.

In sum, the Opinion does not punish Ford for the injuries that the Explorer's design defects have caused non-parties. Instead, it bases its calculation of punitive damages on the $27.6 million in compensatory damages received by the Wilsons. That base, by definition, includes compensation only for *their* injuries; it includes no dollars intended to compensate non-parties (or punish Ford) for such persons' injuries. The Court of Appeal did then consider Ford's recidivism in determining that Ford's behavior was sufficiently reprehensible to warrant an award of punitive damages equal to twice the compensatory damages base. That calculus was entirely consistent with *Philip Morris*.

3. The Opinion Does Not Allow Improper Uses Of Evidence Or Jury Arguments Of Any Sort Rejected In *Philip Morris*.

Trying to shoehorn this case into the analysis in *Philip Morris*, Ford contends that "'the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury'" created an undue risk that the jury punished Ford for harming third persons. Supp. Br. 10 (quoting *Philip Morris*, 127 S. Ct. at 1065). Neither part of that contention is correct (or properly preserved; *see* Part I, *supra*).

a. Plaintiffs Did Not Offer Improper Evidence Of Bronco II Injuries.

Ford did complain in the Court of Appeal, as in its Supplemental Brief, about the admission of evidence of the Bronco II's *instability*. Supp. Br. 4-6. However, Ford does not cite even a shred of evidence submitted to the jury of *injuries* suffered by third parties in Bronco IIs—and there wasn't any. *Cf. id.*; Pet. 29 (citing only (1) evidence of Bronco II *instability* and (2) arguments of counsel).[13] The trial court properly admitted

13. The trial court of course instructed the jury that arguments of counsel are not evidence (35 RT 8155; 41 RT 8505)—an instruction (Cont'd)

evidence of the Bronco II's instability, and Ford's knowledge thereof, in order to show the history of the Explorer's development (*e.g.*, Ford documents assessing the Explorer's stability in light of the Bronco II's known deficiencies) and to show Ford's notice of the problem and of the need to fix it. Pet. App. 17a-20a. The notice issue concerned Ford's liability for punitive damages in the first place, and the reprehensibility of its conduct—not the amount of harm it had caused.

There is a qualitative difference between evidence that a manufacturer knew that a predecessor product had the same defect as the product at issue, on the one hand, and evidence of the actual harm that the past defect did to non-parties, on the other. If Plaintiffs had offered the latter sort of evidence—*e.g.*, expert testimony detailing the number of Bronco II rollovers and calculating the amount of harm they had caused to non-parties—Ford would have had something to complain about. But as Ford's lack of record citations reveals, Plaintiffs did no such thing.

b. Plaintiffs Made No Improper Arguments About Bronco II Injuries.

Nor did Plaintiffs' counsel urge the jury to punish Ford for the harm suffered by Bronco II victims. Ford block-quotes two passages in Plaintiffs' closing argument mentioning the Bronco II. Supp. Br. 5. Ford contends that these passages fall on the wrong side of the "use to measure reprehensibility"/"use to punish for non-party injuries" line, but that is false. Here is the key passage:

> Ford is aware by 1989 that many people are killed or seriously injured in [Bronco II] rollovers. Right in this time period, and they are going out to market with this new launch [*i.e.*, the Explorer] with Job 1

(Cont'd)

that California law presumes the jury to have followed. *See, e.g.*, *People v. Stitely*, 35 Cal. 4th 514, 559, *cert. denied*, 126 S. Ct. 164 (2005); *Karlsson v. Ford Motor Co.*, 140 Cal. App. 4th 1202, 1229 (2006).

> with the engineers telling them [of] the same problems. (35 RT 8173-74 (*quoted at* Supp. Br. 5))

Counsel could not have made the point more clearly: he alluded to people hurt in Bronco II rollovers not to include those third parties' injuries in the pool of harm on which the jury would base Ford's punishment, but only to show that "Ford [was] aware" of the instability problem, yet went "to market" with the Explorer "with the engineers telling them [that] the same problems" remained. That awareness enhances the reprehensibility of Ford's conduct. However, the basis for calculating the amount of Ford's punishment—*i.e.*, the amount of harm to be multiplied by the reprehensibility factor—was limited to the harm that the Wilsons suffered as a result of those "same problems."

While the other block-quoted passage does refer to the Bronco II having killed or injured many people (35 RT 8172), one must view that brief comment in context—*i.e.*, as promptly followed by the "new launch . . . same problems" passage quoted above in this brief. The latter passage tied together counsel's points about the Bronco II into a single description of how Ford's pattern of disregard for the danger of instability began with the Bronco II and carried over—along with that vehicle's basic design flaws—to the original Explorer and, ultimately, the 1997 Explorer that injured the Wilsons. The persistence of that disregard for safety increases the reprehensibility of the conduct that injured the Wilsons, but it was only for their injury that Plaintiffs asked the jury to punish Ford. The Bronco II evidence merely helped show that that injury was no unforeseen mishap, but the latest in a string of eminently foreseeable results of conscious choices.

c. The Opinion Does Not Endorse Improper Arguments About Non-Party Explorer Injuries.

After discussing the Bronco II, the Supplemental Brief quotes passages in Plaintiffs' closing argument allegedly seeking punishment for non-party injuries caused by other Explorers.

Supp. Br. 6-7.[14] The p[illegible]ges do no such thing, and would not warrant a grant of certi[illegible]ri even if they did.

(1) Other Explorer Cases Are Outside The Record.

Preliminarily, Ford complains that these alleged arguments were unfair because "Ford had won the prior eleven cases involving these defect claims, and there was no actual evidence of other injuries, their proximate causes, severity, or how this alleged threat to other drivers compared to that of other SUVs." *Id.* at 6.

This argument goes outside the record and is therefore improper. There is no evidence in the trial record of any of those alleged eleven prior verdicts.[15] *A fortiori*, Ford did not introduce "actual evidence of [the] other injuries, their proximate causes, [or] severity" in the prior cases or otherwise lay a foundation in the record that the accidents or injuries made those cases substantially similar to this case.[16]

(2) The Quoted Arguments Are Not Improper.

Ford's arguments must therefore rest on the four passages of argument it block-quotes. *See* Supp. Br. 7. But those passages will not bear the weight. The first and fourth in no way mention other Explorer rollover accidents, let alone injuries suffered by

---

14. Notably, Ford does *not* claim that Plaintiffs put before the jury improper *evidence* of non-party injuries suffered in Explorer rollovers.

15. Ford proffered such evidence at the time of Phase II closing arguments (41 RT 8534-37); the trial court excluded it (*id.*); and Ford did not challenge the exclusion on appeal.

16. While Plaintiffs do not expect that the Court will consider alleged facts lacking a valid foundation in the record—let alone the alleged "additional victories" after trial mentioned in Ford's Petition (Pet. 27)—we note that, if the Court expanded its inquiry beyond the record, it also would find a comparable number of other Explorer cases involving instability and/or roof crush in which the *plaintiffs* have prevailed.

non-parties in such accidents. They merely note the *potential* harm to other drivers caused by Ford's conduct—the very type of argument this Court approved when it noted in *Philip Morris* that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." 127 S. Ct. at 1065.

The second passage does note "[h]undreds of Explorer rollover cases" but *not* in order to make the injuries suffered in those accidents the base for calculating punitive damages. Rather than mention injuries—let alone suggest their monetary value—counsel immediately explained the relevance of the long line of cases: it shows "Ford management's willingness to accept this risk from the Bronco II through the [1997 Explorer]." 35 RT 8179 (*quoted at* Supp. Br. 7). It shows, in other words, that Ford's conduct toward the Wilsons was reprehensible because it was the latest instance in a long string of similar, uncorrected misconduct. *See Philip Morris*, 127 S. Ct. at 1065 (approving use in punitive damages context of principle that recidivist's "latest crime . . . is considered to be an aggravated offense because a repetitive one") (citations and internal quotation marks omitted).

Similarly, the third passage notes that Mrs. Wilson's accident was not "a single isolated incident," as there were "others in California." But again, counsel never mentioned or alluded to injuries suffered in those accidents or invoked the suffering of non-parties. Instead, he used the fact that this accident was one in a long line to show the conscious, willful nature of Ford's longstanding disregard of the proven risk posed by its conduct.

(3) Ford Invited Any Error.

Even if the arguments of counsel raised a substantial federal question, Ford could not complain about them, for they were addressed to a legal standard given the jury *in an instruction Ford proposed* (41 RT 8444-50, 8458, 8475-77):

> In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, *you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California.* Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states. (41 RT 8528 (emphasis added))

Under California law, when a court instructs a jury on the law, it frames the scope of permissible closing argument. *See Gotcher v. Metcalf*, 6 Cal. App. 3d 96, 100 (1970); *see, e.g., Neumann v. Bishop*, 59 Cal. App. 3d 451, 479-80 (1976); *cf.* CAL. CODE CIV. PROC. §607a (court must inform counsel before closing arguments of instructions it will give). Needless to say, a party cannot complain of an instruction that it proposed itself. *People v. Wader*, 5 Cal. 4th 610, 657-58 (1993). Counsel's arguments simply pointed out to the jury that many other Ford Explorers in California have the same defects as the Wilsons', and may also have "an adverse impact on the citizens of California." Even if such argument crossed a line drawn by *Philip Morris*, it was at Ford's invitation that Plaintiffs and the Court crossed that line.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

DENNIS A. SCHOVILLE
LOUIS G. ARNELL
JAMES S. IAGMIN
SCHOVILLE & ARNELL, LLP
1230 Columbia Street
Suite 800
San Diego, CA 92101
(619) 232-9901

JEROME B. FALK, JR.
Counsel of Record
STEVEN L. MAYER
KEITH D. KESSLER
HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
A PROFESSIONAL CORPORATION
Three Embarcadero Center
7th Floor
San Francisco, CA 94111
(415) 434-1600

Attorneys for Respondents